

# **EXHIBIT C**

ALAN G. LANCE  
Attorney General  
State of Idaho

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

CHARLES L. HONSINGER  
Deputy Attorney General  
Idaho Department of Water Resources  
P.O. Box 83720  
Boise, Idaho 83720-0098  
Telephone: (208) 327-7900  
FAX: (208) 327-7866  
Attorney for IDWR

RECEIVED

JUL 24 1997

RINGERT CLARK

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase Nos. 36-02356, 36-07210, 36-
	)	07427, 36-07720
	)	
	)	AFFIDAVIT OF
Case No. 39576	)	DAVID R. TUTHILL, JR.
_____	)	

STATE OF IDAHO            )  
                                  ) ss.  
County of Ada             )

David R. Tuthill, Jr., being first duly sworn, deposes and states as follows:

1. My name is David R. Tuthill, Jr. I am the Adjudication Bureau Chief for the Idaho Department of Water Resources (IDWR).

2. My work address is Idaho Department of Water Resources (IDWR), 1301 North Orchard, Boise, Idaho 83706. I reside in Boise, Idaho.

1 - AFFIDAVIT OF DAVID R. TUTHILL, JR.

3. My educational background includes a Bachelor of Science degree in agricultural engineering from Colorado State University at Fort Collins, Colorado, in 1974, and a Master of Science degree in civil engineering from the University of Colorado at Boulder, Colorado, in 1975. I have also attended and presented papers at numerous seminars on water rights investigation and administration.

4. I have been registered as a professional engineer in Idaho since 1979.

5. I have worked for IDWR for 21 years in the following positions respectively: Adjudication Section Supervisor; Payette Adjudication Supervisor; Water Allocation Section Supervisor; Regional Office Manager of IDWR's Western Regional Office; and currently as Adjudication Bureau Chief. In these positions I have investigated hundreds of water rights, including reviewing their descriptions in decrees, licenses and permits. I have supervised the distribution of water to water right holders and resolved disputes between competing water users. I have extensive first-hand knowledge of how water rights for a variety of uses interact with other water rights from the same source. I have extensive first-hand experience with the difficulty of resolving disputes between water right holders when the water use under a right is not adequately described.

6. I am familiar with the factual and legal basis for IDWR's policy regarding recommendation of facility volume parameters for fish propagation rights. I have personal knowledge of fish propagation facilities and their uses, and the impact those water uses have on other water rights from the same source.

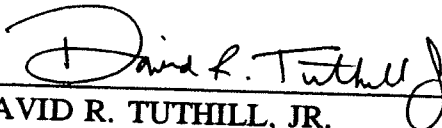
7. I have either personal knowledge of the facts I testify to in this Affidavit, or they

are available to me from IDWR records and personnel, and are the type of facts or data that are regularly and customarily considered by experts in the field of water use and water right investigation and administration to be a reasonable basis to form an opinion about such water use or water right.

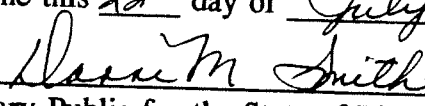
8. I adopt as my testimony and incorporate in this Affidavit the Report Regarding IDWR's Recommendation of Fish Propagation Facility Volume Pursuant to Claim to Water Right Nos. 36-02356, 36-07210, 36-07427, 36-07720 dated July 22, 1997, attached to this Affidavit as Exhibit 1.

9. In Exhibit 1 I set forth my factual understanding of the law which underlies my opinion on behalf of IDWR regarding its use of facility volume to describe fish propagation water rights. Charles L. Honsinger, Deputy Attorney General, assisted me in laying out this description. To the extent, if any, these statements are inaccurate as a matter of fact, the opinions expressed in my report may change.

FURTHER YOUR AFFIANT SAYETH NAUGHT

  
\_\_\_\_\_  
DAVID R. TUTHILL, JR.

SUBSCRIBED AND SWORN to before me this 22<sup>nd</sup> day of July, 1997.

  
\_\_\_\_\_  
Notary Public for the State of Idaho  
Residing at: BOISE ID  
My commission expires: 12/5/2020

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 22<sup>nd</sup> day of July, 1997  
I caused to be served by First Class U.S. Mail, a true and correct copy of the foregoing  
document on the following person(s):

Norman M. Semanko  
Rosholt, Robertson & Tucker  
Box 1906  
Twin Falls, ID 83303

Laird Lucas  
Land & Water Fund of the Rockies  
Box 1612  
Boise, ID 83701

Daniel Steenson  
Ringert Clark  
Box 2773  
Boise, ID 83701-2773

David M. Smith  
Person Mailing Documents

# EXHIBIT 1

**REPORT REGARDING IDWR'S RECOMMENDATION OF FISH PROPAGATION  
FACILITY VOLUME PURSUANT TO CLAIM TO  
WATER RIGHT NOS. 36-02356, 36-07210, 36-07427, 36-07720**

**In Re SRBA**

**Twin Falls County Civil Case No. 39576**

**Sub-Case Nos. 36-02356, 36-07210, 36-07427, 36-07720**

**Report to the SRBA District Court**

**Prepared by David R. Tuthill Jr., Adjudication Bureau Chief  
Idaho Department of Water Resources**

**July 22, 1997**

REPORT REGARDING IDWR'S RECOMMENDATION OF FISH PROPAGATION FACILITY VOLUME  
PURSUANT TO CLAIM TO WATER RIGHT NO. 36-02356, 36-07210, 36-07427, 36-07720

David R. Tuthill Jr., Adjudication Bureau Chief, Idaho Department of Water Resources (IDWR) submits this report regarding claim to water right nos. 36-02356, 36-07210, 36-07427, and 36-07720 in compliance with I.R.E. 706. Mr. Tuthill will be available as a witness to testify regarding IDWR's position as to this issue.

**LEGAL PRINCIPLES UNDERLYING  
RECOMMENDATION OF FACILITY VOLUME**

IDWR's conclusion that water rights for fish propagation facilities should be described by the facility volume rests upon the following legal principles. These principles are not described for purposes of legal argument, but simply for the purpose of laying the framework for the Department's ultimate conclusion regarding the necessity of describing fish propagation rights with facility volume. If these principles are erroneous or inaccurate the conclusions reached in this report may change.

1. In the SRBA, IDWR must make recommendations as to the extent of beneficial use and administration of each water right under state law.
2. IDWR recommends facility volume in fish propagation rights pursuant to I.C. §42-1411(2)(k) and I.C. §42-1411(2)(j).
3. Beneficial use is the basis, measure and extent of a water right.
4. The description of beneficial use is the description of the water right.
5. Different beneficial uses are described in different ways.
6. The description of a water right should be adequate for the Department of Water Resources to administer it vis a vis other water rights.
7. To the extent necessary to satisfy their rights, water right holders are entitled to the maintenance of both water quantity and quality on their water source as of the date of their appropriation of water.
8. The beneficial use of water pursuant to a water right cannot be changed or enlarged in such a way that other water right holders on a source will be injured.
9. Authority to regulate for purposes of maintaining and improving water quality is primarily vested in the Division of Environmental Quality, Department of Health and Welfare. However, there are numerous instances in which water *quantity* issues within IDWR's area of responsibility affect water *quality* issues. For example, water quality may be an issue to be



REPORT REGARDING IDWR'S RECOMMENDATION OF FISH PROPAGATION FACILITY VOLUME  
PURSUANT TO CLAIM TO WATER RIGHT NO. 36-02356, 36-07210, 36-07427, 36-07720

considered as part of the public interest criteria for applications to appropriate water, applications to amend permits to appropriate water, and applications for changes in use of water rights.

**FACTUAL BASIS FOR RECOMMENDATION OF FACILITY VOLUME**

1. The majority of fish propagation facilities divert water from a spring or stream into ponds or raceways where the fish are raised. This diversion reduces the quantity of water in the stream at the diversion point. The water is then released from the raceway or pond back into a stream or river.
2. Because of the nature of this use it is primarily non-consumptive in terms of water quantity. There is some evaporation loss from the ponds or raceways and some amount of transient storage. In terms of water quality this use has a greater impact than many other uses. As water is discharged from the fish propagation facility, it carries some wastes from the fish propagation operation which can render it unusable for downstream uses requiring high quality water.
3. In Idaho many fish propagation facilities are in the Thousand Springs area of the Snake River Canyon. They are located there because of the availability of consistently clean, cold water flowing from the Thousand Springs of the Snake Plain Aquifer. The springs flow from the rims, walls and floor of the canyon and form surface streams flowing to the Snake River.
4. Water from the springs and streams is diverted by canals or pipelines into the fish propagation facilities. Several fish propagation facilities can be located on the same stream, some with diversion points downstream from the return flows of upstream fish facilities. The downstream fish propagation facility or other user may depend upon a particular quality of water being returned to their source from the upstream fish propagation facility.
5. Other appropriators often divert water from the same spring or stream source as does a specific fish propagation facility. These appropriators might be affected by the timing or the quantity of the diversion into that facility.
6. Because the springs are fed by the aquifer above the Snake River Canyon, groundwater appropriators diverting from the aquifer may also be affected by the timing or the quantity of diversions into fish propagation facilities.
7. When fish facilities are constructed the raceways or ponds have a particular volume. This volume generally relates to the number of fish the water user can raise and the water treatment needed for return flows to meet water quality standards.

REPORT REGARDING IDWR'S RECOMMENDATION OF FISH PROPAGATION FACILITY VOLUME  
PURSUANT TO CLAIM TO WATER RIGHT NO. 36-02356, 36-07210, 36-07427, 36-07720

8. An indicating factor of both the diversion rate necessary for and the volume of water used in a fish propagation facility is the facility's volume. If the facility volume should change, there is a possibility that the diversion rate and diversion volume or discharge amount would also change. This could result in an expansion of the right and cause possible injury to other water right holders.
9. Significant expansions in facility volume can result in injury to other water users, even where there is no increase in diversion rate, by increasing the diversion volume (generally by diverting the same diversion rate for longer periods of time), by increasing the consumptive use (generally due to treatment required to meet water quality standards prior to discharge into a water source), or by decreasing water quality.
10. Facility volume expansions can also result in an increase in water quality. Thus, IDWR will not necessarily prevent such expansions; instead, it will use the parameter as an indicator suggesting that it should investigate the impacts of the expansion.
11. An increase in facility volume may result in an increase in production. An increase in production may affect other water users should a senior fish propagator make a call on the resource. If a water right holder junior to the fish propagator is required to mitigate injury to the senior fish propagator, mitigation for increased production from the increase in facility volume would injure the junior.
12. An increase in facility volume may affect the public interest in such matters as the impacts of increased production, or the impact of the expansion on water quantity or quality. The facility volume parameter gives other users and the public notice of the expansion, and triggers IDWR's public interest review.
13. IDWR has described water rights for fish propagation purposes with facility volume parameters in licenses since 1979, pursuant to an Administrator's Memorandum to the Regional Offices and Water Allocation Section. Before 1979, IDWR did not include a facility volume descriptor in fish propagation water right licenses. The impetus for inclusion of facility volume in fish propagation water rights was to prevent the impact of fish propagation facilities on each other relative to water quality.

REPORT REGARDING IDWR'S RECOMMENDATION OF FISH PROPAGATION FACILITY VOLUME  
PURSUANT TO CLAIM TO WATER RIGHT NO. 36-02356, 36-07210, 36-07427, 36-07720

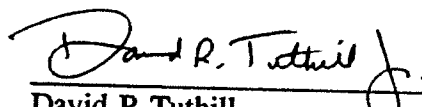
**CONCLUSIONS**

It is my opinion, on behalf of IDWR, that:

1. The extent of beneficial water use at fish propagation facilities is quantified, in part, by the particular facility's volume. An accurate description of a fish propagation water right should include facility volume.
2. An increase in facility volume at a fish propagation facility alerts IDWR to a potential change in the beneficial use of the associated water right, and gives it the ability to determine whether the increase results in an expansion of the right and injury to other users, because of either water quantity or water quality impacts, or both. IDWR considers the water quality aspect as complementary to the primary purpose for inclusion of facility volume descriptors in water rights; that of defining the extent of beneficial use.
3. An increase in the facility volume parameter at a fish propagation facility provides notice to the public that its interest in water quality, water quantity, or in the impacts of increased production may be affected by the expansion of the facility.
4. Facility volume is an imperfect parameter with which to describe the extent of beneficial use of a fish propagation water right. For example, an increase in a fish propagation facility's volume in some cases may actually lessen the water quality impact that the facility has on other water rights. However, as mentioned above, the parameter defines the extent of beneficial use of a water right used for fish propagation purposes and serves as a benchmark by which IDWR or other parties can determine whether the impacts of any expansion in the facility may injure other water rights.
5. Water rights should explicitly describe fish propagation facility volume to allow for effective protection of water rights and water uses that may be impacted by the fish propagation use. This is the most convenient and effective means to define and administer water rights with sufficient specificity to prevent significant expansions in facility volume that may result in enlargement in use of the right or injury to other water rights.

REPORT REGARDING IDWR'S RECOMMENDATION OF FISH PROPAGATION FACILITY VOLUME  
PURSUANT TO CLAIM TO WATER RIGHT NO. 36-02356, 36-07210, 36-07427, 36-07720

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of July, 1997.

  
\_\_\_\_\_  
David R. Tuthill  
Adjudication Bureau Chief  
Idaho Department of Water Resources

**SUPPLEMENTAL REPORT REGARDING IDWR'S RECOMMENDATION OF FISH  
PROPAGATION FACILITY VOLUME PURSUANT TO CLAIM TO  
WATER RIGHT NOS. 36-02048, 36-02703, 36-02708, 36-04013A, 36-04013B, 36-  
04013C, 36-07040, 36-07083, 36-07141, 36-07201, 36-07218, 36-07568**

**In Re SRBA**

Twin Falls County Civil Case No. 39576

Sub-Case Nos. 36-02048, 36-02703, 36-02708, 36-04013A, 36-04013B, 36-04013C, 36-  
07040, 36-07083, 36-07141, 36-07201, 36-07218, 36-07568

*Clear Span*

**Supplemental Report to the SRBA District Court**

**Prepared by David R. Tuthill Jr., Adjudication Bureau Chief  
Idaho Department of Water Resources**

**December 15, 1997**

David R. Tuthill Jr., Adjudication Bureau Chief, Idaho Department of Water Resources (IDWR) submits this report regarding claim to water right nos. 36-02048, 36-02703, 36-02708, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07083, 36-07141, 36-07201, 36-07218, and 36-07568 in compliance with I.C. § 42-1412(4). Mr. Tuthill will be available as a witness to testify regarding IDWR's position as to this issue.

### **LEGAL PRINCIPLES UNDERLYING RECOMMENDATION OF FACILITY VOLUME**

IDWR's conclusion that water rights for fish propagation facilities should be described by the facility volume rests upon the legal principles listed below. These principles are not described for purposes of legal argument, but simply as a matter of fact, in that they underlie the Department's ultimate conclusion regarding the necessity of describing fish propagation rights with facility volume. If the Court determines that IDWR's understanding of the applicable legal principles is erroneous or inaccurate the conclusions reached in this report may change.

1. In the SRBA, IDWR must make recommendations as to the extent of beneficial use and administration of each water right under state law.
2. Extent of beneficial use is the ultimate basis and measure of a water right under state law.
3. A description of the beneficial use is the description of the water right. This description is generally provided by identifying the elements listed in I.C. § 42-1411(a) - (h).
4. Some beneficial uses cannot be fully described using the elements listed in I.C. § 42-1411(a) - (h), so additional elements are provided for in I.C. § 42-1411(2)(i) and (j). I.C. § 42-14119(i) provides that the director shall determine "conditions on the exercise of any water right included in any ... license ...." I.C. § 42-14119(j) provides that the director shall determine "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director."
5. IDWR recommends facility volume for fish propagation rights pursuant to I.C. § 42-1411(2)(i) and (j).
6. The description of a water right should be adequate for the Department of Water Resources to administer use of the water right.
7. The extent of beneficial use of water pursuant to a water right cannot be increased without obtaining a new right for the enlarged use in accordance with state law.

## **FACTUAL BASIS FOR RECOMMENDATION OF FACILITY VOLUME**

1. The majority of fish propagation facilities divert water from a spring or stream into ponds or raceways where the fish are raised. This diversion reduces the quantity of water in the stream at the diversion point. The water is then released from the raceway or pond back into a stream or river.
2. Because of the nature of this use it is primarily non-consumptive in terms of water quantity. There is some evaporation loss from the ponds or raceways and some amount of transient storage. In terms of water quality this use has a greater impact than many other uses. As water is discharged from the fish propagation facility, it carries some wastes from the fish propagation operation which can render it unusable for downstream uses requiring high quality water.
3. In Idaho many fish propagation facilities are in the Thousand Springs area of the Snake River Canyon. They are located there because of the availability of consistently clean, cold water flowing from the Thousand Springs of the Snake Plain Aquifer. The springs flow from the rims, walls and floor of the canyon and form surface streams flowing to the Snake River.
4. Water from the springs and streams is diverted by canals or pipelines into the fish propagation facilities. Several fish propagation facilities can be located on the same stream, some with diversion points downstream from the return flows of upstream fish facilities. The downstream fish propagation facility or other user may depend upon a particular quality of water being returned to their source from the upstream fish propagation facility.
5. Other appropriators often divert water from the same spring or stream source as does a specific fish propagation facility. These appropriators might be affected by the timing or the quantity of the diversion into that facility.
6. Because the springs are fed by the aquifer above the Snake River Canyon, groundwater appropriators diverting from the aquifer may also be affected by the timing or the quantity of diversions into fish propagation facilities.
7. When fish facilities are constructed the raceways or ponds have a particular volume. This volume generally relates to the number of fish the water user can raise and the water treatment needed for return flows to meet water quality standards.
8. An indicating factor of both the diversion rate necessary for and the volume of water used in a fish propagation facility is the facility's volume. If the facility volume should

change, there is a possibility that the diversion rate and diversion volume or discharge amount would also change. This could result in an expansion of the right and cause possible injury to other water right holders.

9. Significant expansions in facility volume can result in injury to other water users, even where there is no increase in diversion rate, by increasing the diversion volume (generally by diverting the same diversion rate for longer periods of time), by increasing the consumptive use (generally due to treatment required to meet water quality standards prior to discharge into a water source), or by decreasing water quality.

10. An increase in facility volume may result in an increase in the beneficial use - fish production. An increase in production may affect other water users should a senior fish propagator make a call on the resource. If a water right holder junior to the fish propagator is required to mitigate injury to the senior fish propagator, mitigation for increased beneficial use from the increase in facility volume would injure the junior.

11. Facility volume expansions can also result in improvement in water quality. Thus, IDWR does not necessarily prevent such expansions; instead, it uses the parameter as an indicator suggesting that it should investigate the impacts of the expansion.

12. An increase in facility volume may affect the public interest in such matters as the impacts of increased production, or the impact of the expansion on water quantity or quality. The facility volume parameter gives other users and the public notice of the expansion, and triggers IDWR's public interest review.

13. IDWR has described water rights for fish propagation purposes with facility volume parameters in licenses since 1979, pursuant to an Administrator's Memorandum to the Regional Offices and Water Allocation Section. Before 1979, IDWR did not include a facility volume descriptor in fish propagation water right licenses.

14. Pursuant to the Idaho Supreme Court's decision in Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985), when water right permits for fish facilities are applied for, plans "sufficient to generally apprise the public of the efficacy of the proposed use and of its potential impact" are submitted to IDWR as part of the licensing process. These plans show, among other things, the facility volume.

14.a. Water right licenses were issued for right numbers 36-07201, 36-07218 and 36-07568 by IDWR. Each of these licenses contained a facility volume condition on the license. The licensee did not appeal the inclusion of the facility volume condition and it became a final condition on the water right licenses.



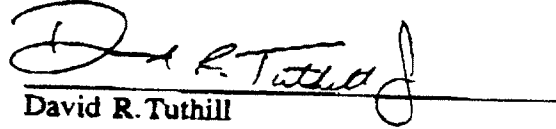
15 The facility volume condition for water rights for fish propagation facilities is an important parameter to define and measure the extent of beneficial use of water used for fish propagation. Although facility volume provides an indicator of potential water quality impacts if fish propagation facilities are enlarged, this is not the primary reason for including facility volume as a descriptive element for fish propagation water rights.

## CONCLUSIONS

It is my opinion, on behalf of IDWR, that:

1. The extent of beneficial water use at fish propagation facilities is quantified, in part, by the particular facility's volume. An accurate description of a fish propagation water right should include facility volume.
2. An increase in facility volume at a fish propagation facility alerts IDWR to a potential enlargement in the beneficial use of the associated water right, and gives IDWR the ability to determine whether the increase results in an expansion of the right and injury to other users, because of either water quantity or water quality impacts, or both. IDWR considers the water quality aspect as complementary to the primary purpose for inclusion of facility volume descriptors in water rights; that of defining the extent of beneficial use.
3. An increase in the facility volume parameter at a fish propagation facility provides notice to the public that its interest in water quality, water quantity, or in the impacts of increased beneficial use may be affected by the expansion of the facility.
4. Although, an increase in a fish propagation facility's volume in some cases may actually lessen the water quality impact that the facility has on other water rights, the parameter defines the extent of beneficial use of a water right used for fish propagation purposes and serves as a benchmark by which IDWR or other parties can determine whether the impacts of any expansion in the facility may injure other water rights.
5. Water rights should explicitly describe fish propagation facility volume to allow for effective protection of water rights and water uses that may be impacted by the fish propagation use. This parameter is the most effective means to define and administer water rights with sufficient specificity to prevent significant expansions in facility volume that may result in enlargement in use of the right and injury to other water rights.
6. For those water rights originally licensed with a facility volume condition, that condition should be included in the court's decree to avoid a collateral attack on the license conditions.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of December, 1997.

A handwritten signature in dark ink, appearing to read "David R. Tuthill", written over a horizontal line.

David R. Tuthill  
Adjudication Bureau Chief  
Idaho Department of Water Resources

# **EXHIBIT D**

North Snake Ground Water District

Josephine P. Beeman  
Dana L. Hofstetter  
BEEMAN & HOFSTETTER, P.C.  
608 West Franklin Street  
P. O. Box 1427  
Boise, ID 83701-1427  
(208) 388-8900  
(208) 388-8400 (Facsimile)  
beehof@micron.net

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR TWIN FALLS COUNTY

In Re SRBA	)	Subcase Nos. 36-02356, 36-07210,
	)	36-07427, and 36-07720
Case No. 39576	)	(Blue Lakes)
	)	
_____	)	<b>REPLY BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND</b>

In their June 5, 1998 Brief, the Claimant, Blue Lakes Trout Farm, Inc. ("Blue Lakes"), claims that facility volume is not necessary to define or administer fish propagation rights. In reaching this conclusion, Blue Lakes asserts that (1) there is no factual relationship between facility volume and fish production; (2) the diversion rate and diversion volume in the Special Master's Recommendations are sufficient to define the quantity element for these fish propagation rights; and (3) facility volume is not necessary for mitigation purposes. For the reasons discussed below, Blue Lakes' conclusion and the premises upon which it is based misconstrues the potential impact of fish facility expansions on junior water users.

1. **Larger Facilities Use More Water and Produce More Fish.**

Blue Lakes refers to an IDWR Memorandum as support for the principle that facility volume is unrelated to fish production. *Blue Lakes' June 5, 1998 Brief*, at 9. The referenced Memorandum apparently states, "production is usually based on the amount of water available rather than the amount of land or the size of the facilities." This statement does not assert, as Blue Lakes claims, that there is no relationship between facility volume and production. Rather, the statement merely indicates that amount of water available is typically the constraint for fish production rather than the amount of land or the size of the facilities. That is to say, land to expand facilities is typically more readily available than additional water. This statement, however, does not disavow any connection between facility volume and fish production as Blue Lakes asserts.

Blue Lakes further refers to the testimony of its witness James E. Parsons as confirming that, "Blue Lakes' production is dependent upon the rate of flow, not the size of the facility." *Blue Lakes' June 5, 1998 Brief*, at 9. In all of Mr. Parsons' testimony, there is actually only one question concerning the relationship between facility volume and production:

Q: We talked about this morning with Mr. Tuthill, you were present, asked him whether production was based on the amount of water available as a diversion rate and diversion volume or the size of the facilities. And the memo that we looked at seems to suggest that it is in fact based on the amount of water and not on the size of the facilities.

Would you agree with that conclusion?

A: I would. Typically we estimate production based on pounds that we can rear per cubic feet per second of water. So on a flow-rate basis.

*September 4, 1997 Trial Transcript*, pp. 205-06, LL. 21-6 (attached hereto as Exhibit A). Here, Mr. Parsons states that fish production is usually described in terms of pounds per cubic feet per second of water. However, his response does not specifically exclude a relationship between production and facility size.

One would expect a relationship among facility size, the amount of water used, and the rate of production. It only makes sense that a larger facility would require the use of more water and be able to produce more fish. Thus, fish production is not necessarily limited by the quantity of water rather than the size of the facilities. There is a relationship between the size of the facility and the amount of water used. One would expect that larger facilities would require more water and be able to produce more fish.

In the *Brief in Support of Motion to Alter or Amend*, the North Snake Ground Water District ("NSGWD") provided a hypothetical in which the average rate of diversion increased as a result of facility expansion. As explained in the hypothetical, a fish propagation facility could increase fish production while remaining within their maximum allowed diversion rate by increasing their facility volume and their average rate of diversion. This hypothetical demonstrates the interrelationship of facility size with both water use and fish production. Blue Lakes has not demonstrated that it operates continuously at the maximum licensed diversion rate. Therefore, the potential exists that water use may increase unless a facility volume quantity is designated.

Nowhere does the record disavow any connection between facility volume and the amount of production. Actually, a larger fish tank which holds more water also is able to hold more fish while requiring more fresh water. While Blue Lakes admits the relationship between production and the quantity of water used, it fails to recognize the concomitant relationship among larger facility volumes, increased water use, and increased production.

2. **The Diversion Rates and Diverted Volumes Designated in the Special Master's Recommendations Are Not Adequate to Fully Define Quantity.**

The diversion rates for these four rights which were included in the water right licenses and then adopted in the Director's Report and Special Master's Recommendations represent maximum allowable diversion rates. It is well known that the Hagerman springs typically are subject to seasonal variations and that the fish propagation facilities actually may utilize average

rates of diversion that are less than the licensed cap. Nevertheless, the diverted volume amounts in the licenses and in the Director's Report and Special Master's Recommendations are calculated based on a continuous year-round flow of the maximum allowable diversion rate. Thus, the diverted volume amounts for these rights do not add any additional limitation. The diverted volume figures provide for continuous year-round diversion at a maximum allowed diversion rate even if the maximum rate of diversion is not an accurate measure of the actual amount of water used at the facility.

The licensed diversion rate which is then incorporated in the Special Master's Recommendations does not reflect seasonal variations or actual diversion practices. In other words, Blue Lakes may be able to increase its production by expanding its facility volume and its average diversion rate without exceeding either the rate of diversion or diverted volume of its water rights as described in its licenses or in the Special Master's Recommendations. Thus, the rates of diversion and the diverted volumes as currently specified are not adequate to describe current actual beneficial uses for these fish propagation rights. Facility volumes are necessary to describe the size of the facilities and to define the parameters of the current actual beneficial uses.

3. **Facility Volume Designations, Subordination Provisions for Water Quantities Associated with Facility Expansions, or Some Other Legal Means Are Necessary To Protect Junior Users from Expansions in Actual Beneficial Use.**

Blue Lakes argues that facility volume designations are not necessary because IDWR cannot force a junior user to provide mitigation and because, at this point, a call by senior Hagerman fish propagators is only hypothetical. Blue Lakes' arguments do not recognize that even though juniors may have the option of either providing mitigation or curtailing their own water use to supply senior users, in either event the junior should not be subject to expansions in use post-dating their own water rights. Further, a call by senior Hagerman spring users is more than hypothetical; Hagerman area spring users have issued calls in the past and, therefore, a call

by a Hagerman fish facility remains a distinct possibility. See *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

In their *Brief in Support of Motion to Alter or Amend*, the NSGWD proposed an alternative to fish facility volume designations. NSGWD noted that "fish propagation water rights could be conditioned to expressly indicate that any facility expansions beyond a certain original facility volume would be subordinated to existing water rights." *Brief in Support of Motion to Alter or Amend*, at 9. Under such a provision, junior water users would not be subject to a call from or mitigation for facility expansions post-dating their own water rights. Such an approach would not prevent Blue Lakes from expanding its facility but would protect junior users from a call associated with such a change. This would address Blue Lakes' concerns for operational freedom and at the same time protect junior users from being curtailed as a result of facility expansions.

#### Conclusion

For the forgoing reasons, facility volumes or other appropriate provisions should be included in the Special Master's Recommendations to protect junior users from expansions of fish propagation water uses.

DATED this 29<sup>th</sup> day of June, 1998.

BEEMAN & HOFSTETTER, P.C.

By



Dana L. Hofstetter



# CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 1998, I caused to be served copies of the  
*Reply Brief in Support of Motion to Alter or Amend* by facsimile, addressed to:

Daniel V. Steenson  
599 W Bannock Street  
P. O. Box 2773  
Boise, ID 83701-2773

John E. Robertson  
Norman M. Semanko  
P. O. Box 1906  
Twin Falls, ID 83303

Idaho Department of Water Resources  
Document Depository  
P. O. Box 83720  
Boise, Idaho 83720-0098

Chief, Natural Resources Division  
Office of the Attorney General  
P.O. Box 44449  
Boise, ID 83711-4449

U.S. Dept. of Justice  
Environment & Natural Resources  
550 W. Fort St., MSC 033  
Boise, ID 83724

  
Dana L. Hofstetter

D:\1780\2\ac\2234

## Multi-Page™

1 JAMES E. PARSONS, called as a witness by Claimant  
2 Blue Lakes Trout, being first duly sworn upon his oath.  
3 testified as follows:

## 4 DIRECT EXAMINATION

5 BY MR. SEMANKO:

6 Q. Good afternoon. How are you?

7 A. Okay. Tired.

8 Q. It's been a long time. Could you please  
9 state your full name and what you do for a living for  
10 the record?11 A. Okay. My name is James E. Parsons; and I'm  
12 the research and technical director for Blue Lakes  
13 Trout Farm.

14 Q. Do you live here in Twin Falls or --

15 A. Yes.

16 Q. How long have you been employed with Blue  
17 Lakes Trout Farm?

18 A. Five years for Blue Lakes Trout Farm.

19 Q. Is that in the current capacity that you're  
20 in now?

21 A. Yes.

22 Q. Do you have additional experience with fish  
23 propagation facilities?24 A. An additional 14 years working as, in the  
25 technical side of aquaculture.

Page 199

1 Q. At a specific location or --

2 A. Eight years with Clear Springs, and then  
3 previous to that in Oregon within propagation.4 Q. And Clear Lakes is in this same Mid Snake  
5 stretch; is that correct?

6 A. Yes.

7 MR. SEMANKO: I might leave it to the special  
8 master. If he has any questions about how the facility  
9 operates, I'm going to leave that wide open for you to  
10 go ahead and ask those questions rather than going  
11 through that, not knowing whether you need that or  
12 not. We've got the maps and an aerial photo as well.  
13 So if we need to do that, I think that would be the  
14 best way to handle it.15 Q. (BY MR. SEMANKO) Are you familiar with the  
16 facility volume at Blue Lakes Trout Farm?

17 A. Yes.

18 Q. And you've calculated that; isn't that  
19 correct?

20 A. Yes.

21 Q. That's one of our exhibits. You can see it  
22 from here.

23 And did you calculate this yourself?

24 A. Yes. It has both operating capacity as it  
25 was that particular day and the total capacity.

Page 200

1 MR. SEMANKO: That was Exhibit No. 11,  
2 Your Honor.3 Q. (BY MR. SEMANKO) There's been a lot of talk  
4 today about increasing facility volume.5 First of all, just for the record, to your  
6 knowledge does Blue Lakes Trout Farm have any current  
7 plans to expand their facilities?8 A. No. Not unless you consider adding another  
9 dam board.

10 Q. Another dam board, okay.

11 A. Yes.

12 Q. Have you submitted any applications to  
13 expand your facilities?

14 A. No.

15 Q. To appropriate more water?

16 A. No.

17 Q. To transfer or change the place of use?

18 A. No.

19 Q. In your opinion would an increase in  
20 facility volume at your plant result in your inability  
21 to meet your point source national pollution discharge  
22 elimination system, NPDES, permit requirements? As a  
23 necessity, would that happen?24 A. No. No, that would have to be considered in  
25 any facility expansion that we would undertake. We

Page 201

1 would have to be able to meet those parameters and  
2 prove that we could before going ahead with the  
3 project.

4 Q. Who would you have to prove that to?

5 A. DEQ.

6 Q. They would not let you expand your facility  
7 if it achieved such a result?

8 A. Right.

9 Q. Who currently regulates your facility other  
10 than DEQ?

11 A. The facility volume?

12 Q. Does anybody regulate your facility volume?

13 A. No.

14 Q. Does anybody measure your facility volume on  
15 a regular basis?

16 A. No.

17 Q. You don't do that?

18 A. No.

19 Q. The department of water resources doesn't  
20 require you to do that?

21 A. No.

22 Q. DEQ doesn't require you to do that?

23 A. No.

24 Q. Does your facility volume -- it's changed  
25 over the years. Has it impacted any water rights to

Page 202

## Multi-Page™

1 your knowledge, the changes in facility volume, over  
2 time?  
3 A. None that I'm aware of.  
4 Q. Are you aware of any downstream uses  
5 requiring the high quality water -- or a particular  
6 quality of water?  
7 A. There is a facility below us that uses our  
8 return water for fish propagation, but --  
9 Q. Have they complained about your presence?  
10 A. No.  
11 Q. Are they happy that you're there?  
12 A. They're happy we're there.  
13 Q. And why is that?  
14 A. We've collected the water and moved it to a  
15 point where they can actually divert the flow into  
16 their facility.  
17 Q. Have you ever had a conflict with any  
18 downstream operators regarding who gets what or whether  
19 it was polluted?  
20 A. No.  
21 Q. It was mentioned this morning that the  
22 Thousand Springs area is meant to be synonymous with  
23 the Mid Snake stretch from Milner to King Hill  
24 roughly.  
25 To your knowledge are all fish propagation

Page 203

1 facilities in that stretch roughly the same; or are  
2 there some differences?  
3 A. There's quite a bit of difference, I think.  
4 between facilities that divert water from the north  
5 side springs, the larger volume facilities, and  
6 facilities that use much smaller volumes on the south  
7 side that tend to be irrigation return flows or seep  
8 tunnels.  
9 Q. What kind of volumes are you talking about  
10 now? The diversion volume, or the facility volume?  
11 A. Diversion volume or flow rates.  
12 Q. Okay. But they're all basically, to your  
13 knowledge, flow-through systems?  
14 A. Yes.  
15 Q. That's the entire Mid Snake stretch?  
16 A. Yes.  
17 Q. How long is the flow-through timing in your  
18 facility?  
19 A. Based on the operational facility volume  
20 that we calculated, an average flow rate for our  
21 facility of 150 cfs, it's about 77 minutes.  
22 Q. 77 minutes to flow through the entire  
23 facility?  
24 A. Yes.  
25 Q. Just a little over an hour. How about at

Page 204

1 the operation -- or I'm sorry, at the capacity level?  
2 A. That works out to just over a hundred  
3 minutes.  
4 Q. A hundred minutes. So just over an hour and  
5 a half.  
6 Do you consider that to be storage of the water  
7 right?  
8 A. No, I wouldn't.  
9 Q. Have you ever applied for a storage right?  
10 A. No.  
11 Q. Have you ever been advised by the department  
12 that you need a storage right?  
13 A. No.  
14 Q. Would you consider your facility to be  
15 nonconsumptive in nature?  
16 A. Yes.  
17 Q. To your knowledge, based on your knowledge,  
18 would you make that characterization of the other  
19 facilities in the Mid Snake?  
20 A. Yes.  
21 Q. We talked about this morning with  
22 Mr. Tuthill, you were present, asked him whether  
23 production was based on the amount of water available  
24 as a diversion rate and diversion volume or the size of  
25 the facilities. And the memo that we looked at seems

Page 205

1 to suggest that it is in fact based on the amount of  
2 water and not on the size of the facilities.  
3 Would you agree with that conclusion?  
4 A. I would. Typically we estimate production  
5 based on pounds that we can rear per cubic feet per  
6 second of water. So on a flow-rate basis.  
7 Q. We heard a lot of things about what facility  
8 volume is meant to cure, things that could happen in  
9 the future, may have happened, or may never happen.  
10 From your perspective, are there things that  
11 facility volume -- including facility volume on your  
12 rights would do to you that would impact your ability  
13 to operate now or in the future?  
14 A. I think one of the things that was brought  
15 out is that perhaps in the future we may have to expand  
16 our size of our facilities to meet water quality  
17 standards, just to add additional treatment or to  
18 somehow effect an improved water quality. It's  
19 conceivable that that could actually prevent that from  
20 happening.  
21 Q. Speaking about your plant in specific and  
22 any knowledge that you have of the Mid Snake plants in  
23 general, are higher velocities sometimes needed to deal  
24 with diseases and parasites and things like that?  
25 A. Yes.

Page 206

Multi-Page™

1 Q. And that would be a change in the facility  
2 volume?

3 A. You typically increase the velocity by  
4 lowering the depth of the pond for lowering the volume.

5 Q. And to lower a velocity, you would need more  
6 facility volume?

7 A. Yes.

8 Q. Do you sometimes need lower velocities for a  
9 density problem?

10 A. No, not typically.

11 Q. Not in your facility?

12 A. Right.

13 Q. Are you aware of anyone who has needed that  
14 in the Mid Snake?

15 A. No, I'm not aware of anybody needing that.

16 Q. Do other factors affect facility volume?

17 Dissolved oxygen, is that a problem?

18 A. No.

19 Q. Temperature?

20 A. No. Not given the volume of flow that we  
21 have and our retention time, no.

22 Q. Because of the size and the retention times?

23 A. Yes.

24 Q. You mentioned water quality concerns. Can  
25 you explain to us a little bit what quiescent zones and

Page 207

1 sizing has changed over the years, and has required us  
2 to remove areas out of production and into quiescent  
3 zone sizing.

4 Q. So in this rough drawing that I've made here  
5 of the blue area, would that be the original 29 ponds?

6 A. Yes.

7 Q. Is any of that now a quiescent zone?

8 A. Yes.

9 Q. But it used to be production?

10 A. All production.

11 Q. And you've made up for some of that  
12 production in other facilities?

13 A. Yes.

14 Q. And then some?

15 A. Yes.

16 MR. SEMANKO: Your Honor, that's really all  
17 the questions I have. As I've stated, if you'd like a  
18 better understanding of the system, I'd be happy to let  
19 you go through that with him.

20 THE COURT: Sure. Mr. Steenson, do you  
21 have any questions?

22 MR. STEENSON: No, Your Honor.

23 THE COURT: Mr. Parsons, I appreciate you  
24 sitting through all of this. The figures that  
25 Mr. Semanko talked about in Blue Lakes' Exhibit 11, it

Page 209

1 settling ponds are, and how those relate to your  
2 facility and deal with water quality?

3 A. Okay. The typical way now to improve water  
4 quality before it leaves our facilities is to have an  
5 area of — a part of a rearing area where fish are  
6 excluded at the downstream end of the rearing area.  
7 That allows the solids that might be present in that  
8 water column to settle out. Those are then typically  
9 vacuumed and moved off line to another set of ponds  
10 where they're collected.

11 Q. Do you know whether adding additional  
12 quiescent zones or settling ponds would be viewed by  
13 the department as additional facility volume?

14 A. I don't know whether it would be — it would  
15 have to be if you had to expand your facility to deal  
16 with that.

17 Q. Those things are ponds or portions of  
18 existing raceways?

19 A. Yes.

20 Q. So they would be included in the total?

21 A. Yes.

22 Q. And could in fact take away from your  
23 production if you weren't allowed to deal with that in  
24 a different way?

25 A. Yeah. The standard for quiescent zone

Page 208

1 has your calculations of system capacity.

2 If I go down to the very bottom there where it  
3 has totals, that's the total facility volume for all of  
4 your facilities?

5 A. Right.

6 THE COURT: And they're not broken down by  
7 which permit they're involved with here?

8 A. No.

9 THE COURT: Do these figures — and they're  
10 not converted to acre-feet. Do they equal the  
11 stipulated facility volume amounts that were mentioned  
12 this morning when you were here earlier?

13 A. Yes. The total volume, the capacity volume  
14 is very similar to the total amount of acre-feet that  
15 has been suggested.

16 THE COURT: Does Blue Lakes re-pump its  
17 water, recirculate it?

18 A. No.

19 THE COURT: So it goes through once and  
20 it's gone?

21 A. It goes through once. And then we'll go  
22 through several uses, but that's typically just a  
23 downstream flow.

24 THE COURT: Several uses. You mean  
25 including your ponding?

Page 210

## Multi-Page™

1 A. We call a use where it might flow at one  
2 particular level and then it drops perhaps three feet  
3 into another level, same size raceway. And that's to  
4 add additional oxygen back into the water. So, for  
5 instance, if I may, water would come into --  
6 THE COURT: Oh, Mr. Parsons, if you'll hold  
7 on a second, we'll put a portable microphone on you  
8 there. We don't want to miss what you're saying.  
9 A. Do you want to point? I can --  
10 MR. SEMANKO: I can do that, sure.  
11 A. Okay. Water may come into the top of one  
12 series of raceways and then flow downstream. You can  
13 kinda see where the break point is between those. And  
14 there's a recharge that takes place at that point for  
15 oxygenation purposes. That's why we do that. The drop  
16 aerates the water and adds oxygen back to the water.  
17 In terms of pumping, as I thought about that, you  
18 know, that would impact water quality more than it  
19 would if we reuse the water. If you were to take the  
20 whole volume of water, take it back and run it through  
21 the fish one time, you know, you could very highly  
22 expand your production with that method, probably more  
23 so than adding additional raceways. So if the concern  
24 is over water quality, that would seem to be a bigger  
25 concern.

Page 211

1 THE COURT: But that's nowhere in any of  
2 your permits, whether you can or can't recycle or reuse  
3 or re-pump water?  
4 A. No. No.  
5 THE COURT: Well, Mr. Tuthill said in his  
6 affidavit that some facilities, even larger ones, have  
7 better quality.  
8 Why would that be? You have more fish; you're  
9 using more water. Why would you have better quality?  
10 A. I guess I -- in referring to what? To  
11 increasing facility volume?  
12 THE COURT: Well, for instance, if you take  
13 a small hatchery, it may have a certain level of  
14 quality. You take a larger one; it may have a higher  
15 standard of quality. It meets a higher standard, or  
16 the water is cleaner as it goes out.  
17 Is that because the large facilities treat their  
18 water better, or they can afford the expense of doing  
19 that, or --  
20 A. No. I think there's a number of operational  
21 considerations that affect water quality far beyond how  
22 many fish you produce. You know, anywhere from the  
23 type of feed that you feed to the type of waste  
24 treatment that you affect on your effluent. And I  
25 don't think you can generalize in saying that big

Page 212

1 facilities could be better than small facilities, or  
2 vice versa.  
3 THE COURT: Do all facilities have to meet  
4 the same water quality standards?  
5 A. Currently, yes.  
6 THE COURT: So if I'm standing at the  
7 bottom of yours and I measure that quality, it's the  
8 same theoretically as it would be at a tiny operation  
9 next door?  
10 A. It has to meet the same concentration  
11 limits, yes.  
12 THE COURT: And that's regardless of  
13 whether the water is going to someone else or being  
14 dumped directly into the Snake?  
15 A. Yes.  
16 THE COURT: That's all I have.  
17 Mr. Semanko, do you have any more questions?  
18 MR. SEMANKO: No, I don't, Your Honor.  
19 THE COURT: Mr. Parsons, thank you for your  
20 testimony. I appreciate it.  
21 (WITNESS EXCUSED)  
22 THE COURT: Mr. Semanko, do you have  
23 anybody else you'd like to call in?  
24 MR. SEMANKO: Your Honor, we have no other  
25 witnesses.

Page 213

1 THE COURT: And, Mr. Steenson, I understand  
2 you may have a witness for us.  
3 MR. STEENSON: Yeah. We have one witness,  
4 Your Honor. Harold Johnson.  
5 THE COURT: Or do you want to take a break  
6 now?  
7 MR. STEENSON: I'd like to just plow through.  
8 It's getting late.  
9 THE COURT: Let's plow through, if you can  
10 stay with us, Mr. Spencer.  
11 MR. SPENCER: Yes, Your Honor.  
12 MR. STEENSON: Your Honor, I intend to offer  
13 one additional exhibit. I do not have extra copies.  
14 I'll show it to the other parties.  
15 (DISCUSSION HAD OFF THE RECORD)  
16 THE COURT: Mr. Steenson, you'd like that  
17 to be marked as Clear Lakes' Exhibit 5?  
18 MR. STEENSON: Yes. Yes, Your Honor.  
19 THE COURT: All right.

\*\*\*\*\*

20  
21  
22  
23  
24  
25

Page 214